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Juvenile Law

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I. Introduction[1]

Review of the 1969 decisions in juvenile law reveals that the courts in California, as elsewhere, have been traumatized by the recent transplant of constitutional due process into the formerly barren soil of the juvenile code. For sixty years, children in most American jurisdictions were hidden from constitutional view.[2] The fiction persisted that they were not tried but treated. If a child came to the attention of the juvenile court, he did so because his parents had failed to fulfill their function. The court succeeded to their role and,

1. This article considers all the significant California cases since May, 1967, as well as mentioning every case reported in the October, 1968, to October, 1969, period. There are three justifications for the expanded scope of the article. First, the starting date of the review coincides with the United States Supreme Court's decision in In Re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967). Juvenile law cases since that date are subject to meaningful analysis only in relation to that decision. Second, this article intends to update the signficant overview of California juvenile law presented in the symposium on *Youth and the Law,* 19 Hastings L.J., No. 1 (Nov. 1967). For the relatively uninitiated practitioner, the most useful article on the California juvenile system is Boches, *Juvenile Justice in California: A Re-evaluation,* 19 Hastings L.J. 47 (1967). See, also, *California Juvenile Court Practice,* California Continuing Education of the Bar, California Practice Book No. 39 (1968); R. Cipes, *How to Defend a Criminal Case,* Ch. 60 (Matthew Bender, 1969). Finally, the fact that this is the first juvenile law article in the *Cal Law—Trends and Developments* series excuses a more comprehensive orientation for understanding of the recent cases.

2. The first juvenile court was created in Cook County, Illinois, in 1899. Since then, every state has adopted a separate court process for juveniles distinct from the normal adult criminal procedures. For broad treatment of the philosophy and practice of the juvenile court system, see Mack, *The Juvenile Court,* 23 Harv. L. Rev. 104 (1909).

in the name of *parens patriae,* exercised only the power it had thus derived to fashion an appropriate cure. Juvenile law was said to be noncriminal. The forum was viewed not so much as a court but as a social services laboratory, in which the specimen unfortunately might be required to languish until his majority rendered him judicially cognizable.

As every lawyer knows, the United States Supreme Court has now finally discovered a place for juveniles within the Constitution. *Kent v. United States*[3] and *In Re Gault*[4] have found that a largely unfulfilled promise of corrective treatment does not justify the immunity of the juvenile process from constitutional scrutiny. In the following Court term, *Tinker v. Des Moines Independent Community School District*[5] brought the Constitution through the schoolhouse door. Taken together, these three cases at least sketch the dimensions of the proposition that children, too, are citizens, entitled to fundamental constitutional rights and liberties.

It is within this still-obscure outline that the courts are working. The present article, accordingly, traces the California response to *Gault's* imperative that the Constitution be applied to those who are under the age of twenty-one.

II. In Re Gault: Answers and Questions

A. *The Holding in Gault*

Constitutional due process, applied to the juvenile court, requires:

1. *Adequate Notice of Charges:*

Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity. . . ."[6]

3. 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966).

4. 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967).

5. 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969).

6. 387 U.S. 1, 33, 18 L.Ed.2d 527, 549, 87 S.Ct. 1428, 1446 (1967).

2. *Right to Counsel:*

[T]he child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child [at delinquency proceedings at which commitment may result].[7]

3. *Self-incrimination:*

[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles.[8]

4. *Confrontation and Cross-Examination:*

[A]bsent a valid confession, a determination of delinquency and . . . commitment . . . cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination.[9]

B. *What Gault Refused To Answer*

Gault, and its precursor, *Kent,* expressly declined to consider a host of problems, and they are questions that litigation since *Gault* and *Kent* has tried to answer.

The issues that the Court in *Gault* expressly refused to answer are:

1. Right of appeal;
2. Right to a transcript of proceedings;[10]
3. Rules of evidence—specifically the admissibility of hearsay;
4. Rights at pre-judicial stages;
5. Rights at postadjudicative stages;
6. Right to bail;

7. 387 U.S. 1, 41, 18 L.Ed.2d 527, 553, 87 S.Ct. 1428, 1451.

8. 387 U.S. 1, 55, 18 L.Ed.2d 527, 561, 87 S.Ct. 1428, 1458.

9. 387 U.S. 1, 57, 18 L.Ed.2d 527, 562–563, 87 S.Ct. 1428, 1459.

10. These first two points were urged upon the *Gault* Court as independent grounds for reversal. Because of the Court's disposition of the case, it refused to reach determination of these questions. (387 U.S. 1, 58, 18 L.Ed.2d 527, 563, 87 S.Ct. 1428, 1459.) The Court did, however, by reference to its earlier decision in *Kent,* suggest the constitutional importance of adequate review of juvenile proceedings. Kent v. United States, 383 U.S. 541, 561, 16 L.Ed.2d 84, 97, 86 S.Ct. 1045 (1966).

7. Right to arraignment;
8. Right to indictment by grand jury;
9. Right to public trial;
10. Right to trial by jury;
11. Arrest without warrant in misdemeanor cases; and
12. Standard of proof.

C. *Policy Considerations Not Raised by Gault*

It is both predictable and proper that the United States Supreme Court should have limited its *Kent* and *Gault* opinions to those questions required for disposition of the particular cases. But lower courts, including California's, in decisions since *Gault,* plainly have been troubled more by the Court's failure to indicate a coherent analytical approach to juvenile law then by the Court's refusal to adjudicate specific issues not required for resolution of the cases before the Court. The narrower questions could be answered more readily if there were a consistent rationale within which to do so. Unfortunately, *Kent* and *Gault* fail to provide such a rationale.[11]

The question of greatest significance is the precise extent to which children possess the constitutional rights of their elders. In *Gault,* the Court said that ". . . neither the Fourteenth Amendment nor the Bill of Rights is for adults only . . . ,"[12] and, again, that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court. . . ."[13] Between the kangaroo court and the modern adult criminal process stands a vast terrain, the terms of occupancy of which the Supreme Court has not defined. In *Gault,* the Court was content merely to repeat its earlier *dictum* in *Kent* that "[t]he hearing must measure up to the essentials of due process and fair treatment, . . ."[14]

11. See Welch, *Kent v. United States and In Re Gault: Two Decisions in Search of A Theory,* 19 Hastings L.J. 29 (1967). See generally Paulsen, *Kent v. United States, the Constitutional Context of Juvenile Cases,* 1966 Sup. Ct. Rev. 167.

12. 387 U.S. 1, 13, 18 L.Ed.2d 527, 538, 87 S.Ct. 1428, 1436 (1967).

13. 387 U.S. 1, 28, 18 L.Ed.2d 527, 546–547, 87 S.Ct. 1428, 1444.

14. 383 U.S. 541, 562, 16 L.Ed.2d 84, 97–98, 86 S.Ct. 1045 (1966).

Several times in *Gault*, the Court took care to limit its discussion to delinquency proceedings that might result in commitment.[15] Thus, the applicability of constitutional standards to the important areas of dependency and neglect cases, and, to some extent, wayward youth cases, is left untouched.

While Chief Judge Bazelon may be correct that "[t]he Supreme Court has recently revolutionized the procedural aspects of juvenile court proceedings . . . ," *Kent v. United States*[16] (still the same *Kent*, after remand), the cases discussed below leave no doubt that the revolution in California is not yet over.

III. Post-Gault Statutory Changes

The premise of this review is that recent juvenile law cases fall into a pattern on the basis of *Gault*, the questions it answered, and those it did not. It is also worth a brief look at the legislative response to *Gault*. The statutory changes serve two functions. First, they remove certain problems from the courts' purview. Second, the legislative voice may inform judicial consideration of the issues that remain.

The California Juvenile Court Law appears in Welfare and Institutions Code sections 500 through 945, substantially as it was reenacted in 1961. This revision cured many defects that *Gault* would have condemned. Still, ten changes to the California Juvenile Court Law, all passed in 1967, reflect the *Gault* decision by introducing or extending the mechanics of procedural due process from adult criminal procedures into the juvenile court.[17] Consistently with the dis-

15. "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents' . . . We consider only . . . proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 387 U.S. 1, 13, 18 L.Ed. 2d 527, 538, 87 S.Ct. 1428, 1436 (1967).

16. 401 F.2d 408, 409 (D.C. Cir. 1968). But see the dissent in that case, 401 F.2d 408, 412–416, for some intimation of the views of the new United States Supreme Court Chief Justice, then Circuit Judge, Burger.

17. For a review of more recent Cal-

tinction made in *Gault,* all ten changes apply only to delinquent and wayward youth cases,[18] and not to dependency and neglect matters.[19]

1. Welfare and Institutions Code section 625 has been amended to require that all section 601 and section 602 minors taken into temporary custody by a peace officer, must be advised of:

   a. the privilege against self-incrimination;
   b. the right to remain silent;
   c. the right to counsel; and
   d. the right to appointment of counsel if the minor is unable to afford one.

2. Welfare and Institutions Code section 627.5 was added to implement exercise of the same constitutional rights at the time a minor is delivered into the custody of a probation officer.

3. Before 1967, if a probation officer filed a petition for detention of a youth, notice of a detention hearing needed to be given only to the minor's parents. Amendment of section 630 now additionally requires notice to the youth himself and provides him with the privilege against self-incrimination and the right to confrontation by, and cross-examination of, witnesses at the detention hearing.

4. New section 630.1 extends all rights to notice to a youth's counsel of record.

5. Where appointment of counsel at detention hearings formerly was discretionary, amendment of section 634 now makes appointment mandatory in virtually every situation.

6. Sections 658 and 660 enlarge notice requirements relating to the adjudicatory hearing.

7. The amendment to section 679 directs the court to

ifornia legislative considerations of the juvenile court law, see Comment, *The California Juvenile: His Rights and Remedies,* 1 Pacific L.J. 350 (1970).

18. Delinquent juveniles are described in Welfare and Institutions Code § 602. Wayward youths are described in Welfare and Institutions Code § 601.

19. Dependent and neglected children are described in Welfare and Institutions Code § 600.

appoint an attorney, at the adjudicatory stage, for minors who are unable to afford counsel and who are alleged to be within Welfare and Institutions Code sections 601 or 602.

8. Section 700 repeats the directive that alleged delinquent and wayward youths be represented by counsel at the jurisdictional hearing.

9. The *Gault* guarantees of the privilege against self-incrimination and the right to confrontation by, and cross-examination of, witnesses is codified in section 702.5.

10. Although the Court in *Gault* expressly declined to decide the issue, the right of a youth unable to afford counsel to be furnished a free copy of the hearing transcript for appeal is embodied in an amendment to section 800.

One final 1967 statutory change deserves discussion: the amendment to Welfare and Institutions Code section 707. That section provides the procedure variously known as referral, transfer, or waiver by the juvenile court of a minor, 16 years of age or older and unfit for treatment within the facilities of the juvenile court, to adult criminal court. *Kent v. United States* involved such a proceeding, and the subject amendment obviously was intended to bring section 707 into conformity with that decision. While *Kent* was decided within the context of a District of Columbia statute, the case's holding, that a waiver order must be accompanied by a sufficiently specific statement of the reasons for the order,[20] has been incorporated into section 707. Waiver now cannot be predicated solely on the nature of the alleged offense but must be supported by an investigative report of the minor's "behavioral patterns." Presumably, *Kent's* requirement of representation by counsel at the waiver hearing is satisfied by the provision of Welfare and Institutions Code section 633 that a minor

20. 383 U.S. 541, 561, 16 L.Ed.2d 84, 97, 86 S.Ct. 1045, 1057. The reason for the requirement is to permit adequate review. *Kent* also decided that waiver may be accomplished only at a hearing where the minor may be represented by counsel, who is entitled to see the child's social records to be considered by the Court. The Court mandated a hearing containing the "essentials of due process and fair treatment," 383 U.S. 541, 562, 16 L.Ed.2d 84, 97–98, 86 S.Ct. 1045. See, Paulsen, *Kent v. United States, the Constitutional Context of Juvenile Cases,* 1966 Sup. Ct. Rev. 167 (1966).

has the ". . . right . . . to be represented at every stage of the proceeding by counsel."

IV. The Recent Cases

A. *Standard of Proof*[20.5]

Welfare and Institutions Code section 701 requires that an adjudication that a minor is a delinquent must be supported by "a preponderance of evidence."[1] The adult criminal standard, of course, calls for proof "beyond a reasonable doubt."[2] The question whether *Gault* impliedly compels the higher standard of proof in juvenile cases has now been before the United States Supreme Court three times but remains unanswered: *In Re Whittington,*[3] (judgment vacated and case remanded for consideration in light of *Gault*); *De Backer v. Brainard,*[4] (issue not properly raised); *In Re Winship,*[5] (probable jurisdiction noted).

While definitive resolution may appear elusive, the question has been set to rest in California by the state Supreme Court in *In Re M.*[6] There, the court held simply that "in the absence of a specific ruling on the issue by the United States Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard [of proof upon a preponderance

20.5. Since preparation of this article the United States Supreme Court has ruled that juveniles are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of criminal law, In re Winship, 396 U.S. —, 25 L.Ed.2d 368, 90 S.Ct. 1068, —. The Court noted and overruled the California Supreme Court decision in In Re Dennis M., 70 Cal.2d 444, 75 Cal. Rptr. 1, 450 P.2d 296 (1969), the case discussed in this section of the article on standard of proof. Nothing in the United States Supreme Court decision requires extended discussion. The Court's analysis and rationale seem totally consistent with the approach and the conclusion of this article.

1. The same standard of proof, "a preponderance of evidence," applies to findings of §§ 600, 601, and 602. A distinction is made, however, in that a § 602 finding must be based on evidence "legally admissible in the trial of criminal cases," while the less stringent test of "legally admissible in the trial of civil cases" applies to § 600 and § 601 cases.

2. Penal Code § 1096.

3. 391 U.S. 341, 20 L.Ed.2d 625, 88 S.Ct. 1507 (1968).

4. 396 U.S. 28, 24 L.Ed.2d 60, 148, 90 S.Ct. 163 (1969).

5. 396 U.S. 28, 24 L.Ed.2d 160, 90 S.Ct. 179 (1969).

6. 70 Cal.2d 444, 75 Cal. Rptr. 1, 450 P.2d 296.

of the evidence] is valid."[7] *In Re M* is a lengthy and far-ranging opinion, the California Supreme Court's only juvenile law decision in 1969, and it deserves some statement of the facts.

The minor stole an automobile from which he removed a .22 caliber revolver. Ten days later, he visited his 15-year-old girlfriend and had talked with her outside her house for about 15 minutes when a shot was fired. The girlfriend's father emerged from the house and found his daughter shot in the head. No one was present but the minor. M told the father that a passerby had fired the shot and promptly went off in pursuit. The minor shortly returned without success, and when a sheriff arrived on the scene, repeated the assertion that a passerby was responsible for the crime. An hour later, however, confronted by more sheriffs, who had found a .22 caliber revolver in a nearby flowerbed, the minor admitted he had shot the girl. He said it was an accident; he had been playing with the gun. Four days later, the girl died. The minor was charged with involuntary manslaughter, gun theft, and auto theft, and a Welfare and Institutions Code section 602 petition was filed and sustained. The minor, who previously had been a ward of the court, was committed to the Youth Authority.

Justice Mosk, writing for the court, makes a two-part analysis of the standard-of-proof issue. First, he examines the explicit holding of *Gault* and concludes that the United States Supreme Court did not expressly require application of the adult standard. Indeed, that question, having been raised on appeal from an Arizona decision, was among the issues the court refrained from considering.[8]

Then the broader question is posed: did *Gault* ". . . by implication [require] that this element of adult criminal trials be incorporated into our juvenile court law"?[9] Stated dif-

7. 70 Cal.2d 444, 460–462, 75 Cal. Rptr. 1, 11, 450 P.2d 296, 305–306.

8. 387 U.S. 1, 18 L.Ed.2d 527, 537, 87 S.Ct. 1428 (1967). See the section "What Gault Refused To Answer," *supra.*

9. 70 Cal.2d 444, 453–454, 75 Cal. Rptr. 1, 6, 450 P.2d 296, 300–301 (1969).

ferently, is the higher standard of proof one of those "essentials of due process and fair treatment"[10] that the Constitution extends to juveniles?

For guidance upon this issue, the court looks to decisions of sister courts, opinions of law review writers, recommendations of model act draftsmen, and the views of a multitude of scholars. The survey yields only "disarray" and "divergence." Attention also turned to the legislature. The court reviews the work of the 1957 Special Commission on Juvenile Law,[11] the revised Juvenile Act that resulted from the commission's study,[12] and, finally, the 1967 legislative response to *Gault*. The Court concluded that "the legislature, moreover, has been fully responsive to *Gault*."[13]

The pivotal criterion adopted by the court is then articulated: "Such deliberate acts of the Legislature come before us clothed with a presumption of constitutionality."[14] Applying this presumption, the court concluded:

> [I]n any event, we cannot say that the Legislature plainly exceeded constitutional limits in finding that the benefits of the reasonable doubt standard would be outweighed by the adverse effects of imposing that doctrine of adult criminal law on the essentially remedial proceedings of the juvenile court.[15]

The nub of the decision on this issue, then, is the characterization of the juvenile process as "essentially remedial." But this is to echo the time-dishonored rhetoric that *Gault*

10. Kent v. United States, 383 U.S. 541, 562, 16 L.Ed.2d 84, 97–98, 86 S.Ct. 1045 (1966).

11. Report of Governor's Special Study Commission on Juvenile Justice (1960).

12. Stats. 1961, Ch. 1616, pp. 3459–3508.

13. 70 Cal.2d 444, 453–454, 75 Cal. Rptr. 1, 6, 450 P.2d 296, 300–301 (1969).

14. 70 Cal.2d 444, 453–454, 75 Cal. Rptr. 1, 6, 450 P.2d 296, 300–301 (1969). Regardless of the general utility of this maxim, its precise reference is far from clear. Presumably, the phrase "deliberate acts" does not refer to the 1961 enactment, which, of course, predated *Gault*. But should the legislature's 1967 amendments to other statutes in the Juvenile Code, taken together with its silence regarding the § 701 standard of proof, be dignified as "deliberate acts"?

15. 70 Cal.2d 444, 457–458, 75 Cal. Rptr. 1, 9, 450 P.2d 296, 303–304.

meant to silence. However laudable the court's reluctance to "introduce a strong tone of criminality into the proceedings,"[16] incarceration, the same consequence as that which results from a "criminal" trial, emanates from the juvenile proceeding.

Gault expressly rejects the notion that the serious ramifications of the juvenile court adjudication may in any way be sloughed off simply by declaring the process "remedial." "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[17] The Court continued, "Neither sentiment nor folklore should cause us to shut our eyes."[18]

But even assuming that rehabilitation of minors is enhanced by their separate and different treatment, it does not follow that these benefits are lost by "constitutional domestication" of the juvenile process. Indeed, the principle established by *Gault* is that while not every feature of the adult criminal procedure must be afforded juveniles, neither may the absence of such safeguards be justified except upon the clearest showing that their implementation would substantially disrupt the juvenile law concept. "But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion."[19]

Application of this test to the issue of standard of proof presented by *In Re M*—would the requirement of proof be-

16. 70 Cal.2d 444, 456–457, 75 Cal. Rptr. 1, 8, 450 P.2d 296, 302–303.

17. 387 U.S. 1, 36, 18 L.Ed.2d 527, 551, 87 S.Ct. 1428, — (1967).

18. 387 U.S. 1, 21, 18 L.Ed.2d 527, 541–542, 87 S.Ct. 1428, —. "Here again, however, there is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, . . . coincide . . . it should be noted that to the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a quid pro quo." 387 U.S. 1, 18 L.Ed.2d 527, 543, 87 S.Ct. 1428.

19. 387 U.S. 1, 22, 18 L.Ed.2d 527, 543, 87 S.Ct. 1428.

yond a reasonable doubt militate against the rehabilitative goal of the juvenile court—produces a result contrary to that which the California court reached. Nor does the decision contain adequate support, in spite of its length, for such a result. There is a suggestion that "speedy and individualized rehabilitative services," and "a prompt factual decision," are in the minor's best interests. This may certainly be so. But there is no reason why a higher standard of proof precludes promptness. There is no reason to believe that an appearance of unreliability, even in the name of speedy adjudication, enhances the juvenile court's rehabilitative goals.[20]

To attribute a presumption of constitutionality to the legislature is to abdicate the court's role. *Gault* requires realism. As Justice Peters in his dissent makes clear:

> Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation, and, as well, is contrary to the teachings of *Gault*.[1]

In Re M indicates the California Supreme Court's unwillingness to conform the state's juvenile law to the spirit of *Gault*. The letter of *Gault* has been codified. The guiding principle of that opinion, however, that the fundamentals of constitutional due process—including proof beyond a reasonable doubt—be excluded from the juvenile law only if they deprive a minor of the special and beneficial status that the juvenile law should accord, has been rejected.

Several California Courts of Appeal have also been con-

20. "Whenever juvenile courts do not scrupulously follow the principles of procedural due process in their dealings with minors—whenever the juvenile is lulled into a feeling of serenity only to receive stern disciplining—he 'feels that he has been deceived or enticed,' and thus rebels against and resists the rehabilitative efforts of the court personnel." In Re H.L.R., 269 Cal. App.2d 610, 75 Cal. Rptr. 308 (1969), citing Wheeler and Cottrell, *Juvenile Delinquency—Its Prevention and Control,* Russell Sage Foundation, 1966, p. 35.

1. 70 Cal.2d 444, 465–466, 75 Cal. Rptr. 1, 14–15, 450 P.2d 296, 308–309 (1969).

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fronted with the standard-of-proof issue.[2] *In Re K.D.K.*,[3] like *In re M*, considers, as it should, that *Gault* is controlling. But, again, like the California Supreme Court, the lower court was impressed that California's juvenile laws "already were free of the specific defects found constitutionally fatal in *Gault*."[4] Thus, determination of the specific standard-of-proof question is made to depend on (1) confining the effect of *Gault* to the limited holding of the case, and (2) the seemingly fortuitous circumstance that many other provisions of the state's Juvenile Code were revised in 1961.

Perhaps most unfortunate is the K.D.K. court's retention of the juvenile law rhetoric: "We are not prepared to depart from the holdings of the California courts that proceedings in the juvenile court are, indeed, of a civil nature."[5] Nor is it deemed persuasive that the juvenile court hearing "may result in a deprivation of liberty to the juvenile."

Thus, the Court refused to recognize the "realities" of the *Gault* analysis of juvenile proceedings, for example, "the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21."[6] In this sense, *K.D.K.* is seen to be a pre-*Gault* decision. Indeed, the Court's failure to apply the *Gault* approach may be explained by its *dictum* that "[the juvenile court system] can hardly suffer further attrition and maintain its essential character."[7]

2. While the standard-of-proof contention was raised in In re F, 270 Cal. App.2d 603, 75 Cal. Rptr. 887 (1969), the court of appeal thought the issue conclusively determined by In Re M, *supra*, and summarily rejected the argument.

3. 269 Cal. App.2d 646, 75 Cal. Rptr. 136 (1969).

4. 269 Cal. App.2d 646, 652, 75 Cal. Rptr. 136, 140–141.

5. 269 Cal. App.2d 646, 653, 75 Cal. Rptr. 136, 141.

6. 387 U.S. 1, 36, 18 L.Ed.2d 527, 551, 87 S.Ct. 1428 (1967).

7. 269 Cal. App.2d 646, 750. The standard-of-proof issue was raised in a novel context in the case of In Re J.F., 268 Cal. App.2d 761, 74 Cal. Rptr. 464 (1969). The case involved a Welfare and Institutions Code § 1800 proceeding at which the California Youth Authority is authorized to petition the court for continued commitment of a person who reaches 21 years of age and whose discharge "would be physically dangerous to the public because of his mental or physical deficiency, disorder, or abnormality." The court noted that no statutory standard of proof is prescribed for § 1800 proceedings. The court distinguished a § 1800 hearing from a § 602 hearing, at which proof of a criminal act is required. The court stated that § 1800

B. *Waiver of Miranda Rights*

The express holding in *Gault* introduced into the juvenile field the constitutional rights enunciated by the United States Supreme Court one year earlier in *Miranda v. Arizona*.[8] *Miranda* held that:

> [P]rior to any questioning [by law enforcement officers of a suspect], the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed.[9]

The Court also stated that a defendant may waive these rights, "provided the waiver is made voluntarily, knowingly and intelligently."[10] Applied to the juvenile process, waiver of counsel raises the question whether a minor, because of his age, can ever "voluntarily, knowingly and intelligently" waive his rights. The answer in California is that he can.

The leading case on juvenile waiver of *Miranda* rights is *People v. Lara*.[11] *Lara* and *In Re M* are the California Supreme Court's only juvenile law decisions since *Gault*. Both *Lara* and *M* were six-to-one decisions, written by Justice Mosk, with dissents by Justice Peters.

Lara and his codefendant, Alvarez, were convicted, in adult criminal court, of murder.[12] Both had been advised several times during the course of police investigation of their *Miranda* rights. Both nonetheless wrote out and signed confessions to the crime. Neither took advantage of his right to counsel. On appeal, the California Supreme Court rejected the argu-

proceedings more closely resemble narcotics proceedings. Then, even assuming that *Gault* applied to § 1800 hearings, the court found the "civil" nature of the proceeding to justify the preponderance of the evidence standard of proof.

8. 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966).

9. 384 U.S. 436, 444, 16 L.Ed.2d 694, 706, 86 S.Ct. 1602, 10 A.L.R.3d 974, 993.

10. 384 U.S. 436, 444, 16 L.Ed.2d 694, 706, 86 S.Ct. 1602, 10 A.L.R.3d 974, 993.

11. 67 Cal.2d 365, 62 Cal. Rptr. 586, 432 P.2d 202 (1967).

12. Lara was 18 years old and Alvarez was one month short of 18 at the time the crime was committed.

ment that no minor is capable of effective waiver unless the waiver is also consented to by a friendly adult—parent, guardian, or attorney—who himself has received a *Miranda* warning.[13] Instead, the court adopted a "totality of the circumstances" test:

> "This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement."[14]

Both defendants contended that they had not intelligently and understandingly waived their rights. They argued that they were members of a minority group, with little education (ninth or tenth grade) and no money, and were affected by alcohol and lack of sleep. A psychologist testified without contradiction that Alvarez had an I.Q. of 65 to 71, "mild mental retardation," and a mental age of 10 years, 2 months. A pyschiatrist for the state in rebuttal said that Alvarez possessed "innate shrewdness" and "the accumulated life experience of a 17-year-old person."[15]

The Court rejected some of the minor's assertions, minimized others, and concluded that, in the totality of the circumstances, the waivers had been effective. The factors that militated most unfavorably against the minors seemed to be (1) their demeanor during the interrogation ("very calm" and "cognizant and aware"); (2) their relatively advanced age

13. 67 Cal.2d 365, 378–380, 62 Cal. Rptr. 586, 596, 432 P.2d 202, 212.

Justice Peters, in dissent, states that this should be the rule. It is not certain whether his opinion squares with the California legislature's amendment to Code of Civ. Proc. § 372 shortly after the *Gault* decision issued. The pertinent part of that amendment reads: "Nothing in this section or in any other provision . . . is intended by the legislature to prohibit a minor from exercising an intelligent and knowing waiver of his constitutional rights in any proceeding under the Juvenile Court Law. . . ."

14. 67 Cal.2d 365, 383–384, 62 Cal. Rptr. 586, 599, 432 P.2d 202, 215.

15. 67 Cal.2d 365, 377–378, 62 Cal. Rptr. 586, 595, 432 P.2d 202, 211.

(about 18); (3) their prior experience with the police; and (4) their apparent comprehension of the warning (each wrote a statement of *Miranda* rights into his confession).

On these facts, Justice Peters concedes, the majority properly could have applied the totality-of-the-circumstances test to have found that an adult had effectively waived the *Miranda* rights. But, the dissent argues, this begs the question whether, because of his age, a minor, alone, ever can effectively waive his constitutional rights. The court's mistake, Justice Peters writes, is to emphasize the conduct of the police, rather than the competency of the youth. Had the court's focus been on the capacity of the minor, the court would have had to acknowledge the minor's general legal incompetence in civil matters. As one writer has pointed out, the civil law establishes the presumption of incompetence to protect the vast number of minors, even though it is certain that a few, in fact, are capable of protecting their own interests.[16] Adoption of this presumption to the *Miranda* waiver would require the police to refrain from interrogating the minor until he is in the company of a friendly adult. Apparently, the State Supreme Court is not ready to place this burden on the police.[16.5]

As Justice Peters points out, the cases most relied on by the court reach a contrary result.[17] In these decisions, the

16. Note, Waiver of Constitutional Rights by Minors: A Question of Law or Fact?, 19 Hastings L.J. 223 at 224 (1967).

16.5. A recent federal district court decision reaches a contrary conclusion. In holding that the state had failed to provide adequate legal assistance to minors brought before the juvenile court in San Francisco, the court held that the law required that counsel be provided at the "first point of contact," at that critical stage in the proceedings when the "juveniles are faced with the awesome determination whether to waive counsel." Scott v. Mayer, N. D. Cal. Civil No. C–70 441 GSL (April 13, 1970).

17. The majority cites the leading cases from the United States Supreme Court: Gallegos v. State of Colorado, 370 U.S. 49, 8 L.Ed.2d 325, 82 S.Ct. 1209, 87 A.L.R.2d 614 (1962) and Haley v. State of Ohio, 332 U.S. 596, 92 L.Ed. 224, 68 S.Ct. 302 (1948). See also Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963); Reck v. Pate, 367 U.S. 433, 6 L.Ed.2d 948, 81 S.Ct. 1541 (1961); Payne v. State of Arkansas, 356 U.S. 560, 2 L.Ed.2d 975, 78 S.Ct. 884 (1958); Mallory v. United States, 354 U.S. 499, 1 L.Ed.2d 1479, 77 S.Ct. 1356 (1957).

focus was on the minors, variously described as "a mere child," "an easy victim of the law," "tender and difficult," "a lad in his early teens."

The failure to place principal emphasis on the special status of minors exposes the court to Justice Peters' criticism that it disregards *Gault*[18] and relegates minors to the second-class citizenship from which *Gault* and *Kent* tried to free them.[18.5]

Lara and *In Re M*, read together, reveal the California Supreme Court's determination to limit *Gault* to its precise holding. The United States Supreme Court was able to decide that case on the basis of four aspects of the adjudicatory hearing. *In Re M* refuses to extend *Gault* to other facets of that hearing. *Lara* refuses to extend *Gault* back to the pre-adjudicatory stages.[19]

In *Lara*, the California Supreme Court held juveniles to the adult test for effective waiver, consideration of age having some unknown effect. But in *In Re M*, the court withholds from juveniles the benefit of adult standard of proof. As the United States Supreme Court noted:

18. The *Lara* court's sole acknowledgment of *Gault* is contained in one footnote, which begins, "Our decision here is not affected by *In Re Gault*," 67 Cal.2d 365, 391, 392, 62 Cal. Rptr. 586, 604, fn. 21, 432 P.2d 202, 220 (1967). This statement by the court is not a completely accurate reflection of *Gault*. *Gault* contained the following guidance, unheeded by the *Lara* court, with regard to the *Miranda* issue: "If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright, or despair," 387 U.S. 1, 55, 18 L.Ed.2d 527, 561, 87 S.Ct. 1428 (1967).

18.5. But *cf. In re R.*, 1 Cal.2d 855, 83 Cal. Rptr. 671, 464 P.2d 127 (1970), a California Supreme Court decision issued since preparation of this article. The court holds "that the juvenile court should consider whether a child appreciates the wrongfulness of his conduct in determining whether the child should be declared a ward of section 602 of the Welfare and Institutions Code (Pen. Code, § 26)."

19. The California court's restrictive approach is no less clear in the limitation of both *Haley, supra,* and *Gallegos, supra,* to their strict holding. "For our present purposes, however, the primary significance of *Haley* and *Gallegos* is that the high court declined to hold that as a matter of law all minors without such advice [of a friendly adult] lack the capacity to make voluntary confessions," 67 Cal.2d 365, 382–383, 62 Cal. Rptr. 586, 598, 432 P.2d 202, 214.

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[20]

The waiver rule was also in issue in *In Re M.* The facts present a 15-year-old boy to whom the *Miranda* warning was read from a card. At trial, the sheriff who testified as to the warning was unable to state all of it, as required by *Miranda.* Nevertheless, the court held the minor's waiver effective.

A minor's waiver was found to be effective in *People v. Camarillo.*[1] Camarillo, 17 years old, was convicted of murder on his signed statement. Apparently, his attorney at trial objected to introduction of the statement solely on the basis that the defendant was under 18. Thus, when the court applied the *Lara* totality-of-the-circumstances rule, there was no evidence either of unfairness on the part of the police or of particular disabilities of the youth—mentality, education, or the like. In fact, the only evidence deemed pertinent by the court was harmful: "roving about at late hours, committing crimes of violence and associating with codefendants."[2] Thus, the court inferred from *Lara* a presumption of effective waiver that could be overcome only by evidence of a youth's incapacity. It is doubtful that the *Lara* court intended this result or that *Gault* permits it.

There are four California Courts of Appeal decisions holding evidence in juvenile proceedings to be inadmissible because there had been no effective waiver of *Miranda* rights. The first of these, chronologically, is *In Re Butterfield.*[3] The petitioner in this habeas corpus proceeding was a 15-year-old girl uncontradictedly described as a "schizophrenic reaction, schizoaffective type." At the juvenile court's adjudicatory hearing, the petition against the juvenile was read to her and

20. Kent v. U.S., 383 U.S. 541, 556, 16 L.Ed.2d 84, 94–95, 86 S.Ct. 1045, 1054 (1966).

1. 266 Cal. App.2d 523, 72 Cal. Rptr. 296 (1968).

2. 266 Cal. App.2d 523, 531–532, 72 Cal. Rptr. 296, 301.

3. 253 Cal. App.2d 794, 61 Cal. Rptr. 874 (1967).

she answered affirmatively to the probation officer's inquiry whether the charges were true. On this basis alone, the petition was sustained.

The reviewing court held this self-incriminating statement to be inadmissible. The court did so even though the record reflected that the girl was accompanied by her mother at the hearing and that both of them were advised of the minor's right to counsel. Nonetheless, the court found, relying on *Gault,* that "[t]he formal and literal waiver of counsel was ineffectual because [it was] not made with an intelligent understanding of its consequences."[4] This was so because there was no evidence that the minor had any awareness of her right to refrain from self-incrimination. Indeed, the court found the emotionally disturbed minor to have no comprehension that long-term confinement in a correctional institution was a possible consequence.[5]

The minor in *In Re Teters*[6] was found to be a ward of the court on the basis of his confession that he had stolen an automobile. The confession constituted the only evidence on which the adjudication was made. The appellant had been taken into custody initially on the belief that he was a runaway. The police had reason to believe that he might be responsible for an auto theft that had recently occurred. Once in custody, the minor was asked about the automobile, and eventually admitted that he had taken the car. At that point, the officer advised the minor of his *Miranda* rights, by read-

4. 253 Cal. App.2d 794, 797–798, 61 Cal. Rptr. 874, 877.

5. In a very perceptive *dictum,* the court decried the probation department's filing of a § 602 petition alleging that the minor was a delinquent. Originally, a § 601 petition was filed because the child had run away from her parent's home. Before the petition could be heard, the minor was committed to a mental institution for three 90-day periods. At the completion of this commitment, the petition was heard and the girl found to be a § 601 ward of the court. A month later, the girl ingested an overdose of pills. It was on the basis of this suicide attempt alone that the § 602 petition was filed. Such an escalation is permitted whenever a ward of the court disobeys a lawful order of the court. The reviewing court characterized her suicide attempt as a product of psychic imbalance in no way associated with the opprobrium reflected by a § 602 delinquency petition.

6. 264 Cal. App.2d 816, 70 Cal. Rptr. 749 (1968).

ing them from a card. The minor then made a complete confession, which was repeated at the adjudicatory hearing.

The reviewing court held that *Miranda* attached as soon as the minor was in custody, because at that time he was suspected of auto theft. The court admitted that the police officers were neither oppressive nor coercive. Nevertheless, the court determined that the admission was made "under the conditions which invite coerced confessions and other evils of custodial interrogation and falls within the scope of the *Miranda* warning rule."[7]

In determining whether the subsequent confession made in court was necessarily tainted, the reviewing court followed *Gault* in reaching a determination. The reviewing court stated that *Gault* applied the constitutional privilege against self-incrimination to juveniles as well as to adults. Therefore, based on California decisions in adult criminal trials, the court determined that the confession at trial was impelled by the minor's extrajudicial confession and that the pre-trial confession was inadmissible.

Again, in *In Re Rambeau,*[8] the minor's wardship under section 601 was predicated solely upon a confession. Here, the court found the *Miranda* warning had been given. However, the court went on, "[C]ompliance with the requirement of warning contained in [*Miranda*] is not enough to settle the matter, at least in a case involving a minor."[9] After quoting extensively from *Gault,* the court stated the reasons that the confession, made during an illegal detention, could not be separated from such unlawful detention. First, no attempt was made to contact the 17-year-old minor's father. Second, the court noted that Welfare and Institutions Code section 625 authorizes a police officer to take a minor into temporary custody without a warrant but, unless the minor is promptly released, he must be taken without delay before a probation officer. The police did not do this, but instead detained him

7. 264 Cal. App.2d 816, 820–821, 70 Cal. Rptr. 749, 752.

8. 266 Cal. App.2d 1, 72 Cal. Rptr. 171 (1968).

9. 266 Cal. App.2d 1, 4–5, 72 Cal. Rptr. 171, 174.

and proceeded to interrogate him. Third, the court found the generality of the questioning by the police to be an invitation to a confession of guilt.

In *Re H.L.R.*,[10] involved a particularly unsavory instance of police interrogation of a 16-year-old grossly affected by drugs. Applying the *Lara* totality-of-the-circumstances test to the question of effective waiver of *Miranda* rights, the court found that, in the circumstances described, the prosecution had failed to establish its burden of proof that the minor's waiver had been effective.[11]

C. *Admissibility of Evidence*

Two cases addressed themselves to the importance of the Welfare and Institutions Code's insistence on a bifurcated hearing and a related requirement that the probation officer's social study of the juvenile to be offered the court be withheld until jurisdiction of the court has been adjudicated. In the earlier days of the juvenile court, the probation officer's report concerning a youth, replete with extrajudicial statements of varying degrees of reliability, was furnished the judge before the jurisdictional hearing. Theoretically, he disregarded the information in the report in determining the issue of jurisdiction. This practice was heavily criticized in the report of the Governor's Special Study Commission on Juvenile Justice, 1960. Consequently, the 1961 Juvenile Court Act eliminated this practice. Two clear stages of the juvenile court proceedings—one jurisdictional, and the other dispositional—were established. Welfare and Institutions Code sections 701, 702, and 706, taken together, permit the judge to consider the probation officer's report only at the dispositional stage, after jurisdiction has been found.

10. 269 Cal. App.2d 610, 75 Cal. Rptr. 308 (1969).

11. 269 Cal. App.2d 610, 75 Cal. Rptr. 308. Two other cases provide perspective on the question of effective waiver. People v. Cooper, 268 Cal. App.2d 34, 73 Cal. Rptr. 608 (1968) approves the appointment of counsel for a 15-year-old witness. Such solicitude profitably could be transported into the *Miranda* waiver cases. On the other hand, an 11-year-old boy was found to be criminally negligent in the case of In Re T.R.S., 1 Cal. App.3d 178, 81 Cal. Rptr. 574 (1969).

In the case of *In Re Corey*,[12] the reviewing court determined that there was substantial admissible evidence on which to sustain the court's imposition of jurisdiction under section 602. Nonetheless, because the probation report had been considered by the juvenile court before the jurisdictional hearing was conducted, the reviewing court reversed the judgment. "Where the commission of a crime is alleged as the jurisdictional fact and the allegation is disputed, the court's error in receiving the social study before the jurisdictional hearing goes so directly to the fairness of the hearing that the resulting adjudication is [invalid]. . . ."[13] Both the language and the approach of this opinion accurately reflect the philosophy of *Gault*.

Reversal was required, too, in *In Re F*.[14] In this case, as in *Corey*, the court had examined the probation report before resolving the disputed allegations of the section 602 petition. The reviewing court found the adjudication invalidated by premature consideration of the probation report, which the court characterized as containing much hearsay, prejudicial matter unrelated to the charged offense, and recommendations unfavorable to the minor.[15]

Two other cases involved questions of the admissibility of evidence in juvenile hearings. *In Re M.G.S.*[16] establishes the salutary rule that an admission of guilt cannot be made by a minor's attorney, but must be offered by the minor himself. The reviewing court found that it was obligatory on the juvenile court to reject the offered admission. Admission by counsel alone provides no basis on which to sustain a delinquency petition.

In Re Rambeau,[17] previously discussed in the waiver section

12. 266 Cal. App.2d 295, 72 Cal. Rptr. 115 (1968).

13. 266 Cal. App.2d 295, 298–299, 72 Cal. Rptr. 115, 118.

14. 270 Cal. App.2d 603, 75 Cal. Rptr. 887 (1969).

15. 270 Cal. App.2d 603, 604–605, 75 Cal. Rptr. 887, 888. These two cases, In re Corey and In re F, have now been approved by a decision of the California Supreme Court issued since preparation of this article, In re R, 1 Cal.3d 855, 83 Cal. Rptr. 671, 464 P.2d 127 (1970).

16. 267 Cal. App.2d 329, 72 Cal. Rptr. 808 (1968).

17. 266 Cal. App.2d 1, 72 Cal. Rptr. 171 (1968).

above, also stands for the proposition that a statement taken in violation of *Miranda* rights is inadmissible in a section 601 proceeding, as well as one under section 602. The distinction between the two proceedings is, of course, in the type of evidence that can be received. Both proceedings require that the allegations of the petition be sustained only on a preponderance of evidence. But in the section 602 hearing, evidence may be received only if it is admissible in the trial of criminal cases. In section 601 hearings, however, evidence admissible in the trial of civil cases is sufficient.[18] Nevertheless, even conceding that a section 601 proceeding may be "civil," the *Rambeau* court construed the *Gault* requirement of fundamental fairness in juvenile proceedings to require the exclusion of statements obtained in violation of *Miranda.*

D. *Right to Jury Trial*

In Re T.R.S.[19] raises the major issue of the minor's right to trial by jury.[20] Unfortunately, the court disposes of the contention with only cursory consideration. The court refers to *Gault* for the proposition that "the federal Constitution 'does not require that the full panoply of rights accorded to an adult accused of crime be erected in the juvenile court.' "[1] Relying on *In Re M,* the court rejected trial by jury because it would "introduce a strong tone of criminality into the proceedings."[2]

18. Welf. and Inst. Code § 701.

19. 1 Cal. App.3d 178, 81 Cal. Rptr. 574 (1969).

20. This question was raised but not decided in De Backer v. Brainard, 396 U.S. 28, 24 L.Ed.2d 148, 90 S.Ct. 163 (Nov. 12, 1969), and in the *Gault* decision itself.

1. 1 Cal. App.3d 178, 181–183, 81 Cal. Rptr. 574, 576 (1969) (citing In Re M., 75 Cal. Rptr. 1, 4).

2. 70 Cal.2d 444, 456, 75 Cal. Rptr. 1, 8, 450 P.2d 296, 302–303, but compare In Re M, 70 Cal.2d 444, 465–466, 75 Cal. Rptr. 1, 14, 450 P.2d 296, 308–309 (dissenting opinion): "Certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case." See also Boches, Juvenile Justice in California: A Re-evaluation, 19 Hastings L.J., 47, 88–90, where a strong argument is advanced that *Gault* may compel the right to trial by jury for juveniles.

E. *Referral to Adult Court*

Welfare and Institutions Code section 707 waiver proceedings are strongly affected by the United States Supreme Court's decision in *Kent,* a waiver case, as well as by the general philosophy of *Gault*. In the decision of *M v. Superior Court,*[3] waiver was predicated solely on the basis of the offense that the minor allegedly had committed. The reviewing court found this result to be prohibited by the 1967 amendment to section 707, which expressly states that "the offense, in itself, shall not be sufficient to support [waiver]." Additionally, there was a failure of the probation department to submit, and the court to consider, a report on the behavioral patterns of the minor that is also required by section 707. Accordingly, transfer of the minor to an adult court was invalidated.

M v. Superior Court relied heavily on the decision in *Richerson v. Superior Court.*[4] Here again, transfer was determined without reference to the minor's behavioral background. Indeed, an extensive description of the minor presents the picture of a youth completely amenable to the rehabilitative purposes of the juvenile court. Ultimately, the reviewing court was compelled to conclude that the trial judge must have "overlooked" the 1967 amendment to section 707.

F. *Section 600 Dependency and Neglect Cases*

The 1967 report of the National Crime Commission recommended that juvenile court jurisdiction over dependent youths be abolished, since such cases involve inability, rather than willful failure, to provide properly for children, and can more appropriately be dealt with by social, nonjudicial agencies. Indeed, section 600 proceedings, involving, as they do, no "act" of the child at all, are at best an anomaly in any court. Recent dependency cases illustrate the inadequacy of the juvenile court to deal with such situations.

The most significant recent dependency case is *In Re Raya.*[5]

3. 270 Cal. App.2d 566, 75 Cal. Rptr. 881 (1969).

4. 264 Cal. App.2d 729, 70 Cal. Rptr. 350 (1968).

5. 255 Cal. App.2d 260, 63 Cal Rptr 252 (1967).

There, section 600 petitions were sustained against a whole family of children, both their parents were deprived of custody, and the children were committed to an institution. The conclusion that the children lacked proper and effective care and control rested solely on the circumstance that the children's natural parents each had lived in unmarried cohabitation with other partners for more than five years. What the juvenile court failed to consider, however, was: (1) that the mother's extramarital relationship was a stable one in which the children were happy, healthy, well-adjusted, and provided with love, security, and physical well-being,[6] and (2) that poverty alone had prevented the parents' divorce and legitimation of their present relationships. The *Raya* court noted the danger of imposing on the poor standards adopted from the well-to-do, standards that "may avoid a theoretical discrimination and create a practical one."[7] The court stressed that in wardship proceedings, the welfare of the child must be the paramount concern. The dominant parental right to custody requires an extreme situation before judicial intervention may be justified. Finding no such evidence in this case, the court terminated the children's wardship.

Raya was followed in almost identical circumstances in *In Re A.J.*[8] Here, a section 600 petition was sustained by reason of the mother's "depravity." Such depravity was based solely on the mother's cohabitation with a man not her husband. Here, too, poverty alone prevented the mother from marrying the man with whom she was living. The reviewing court adopted the rationale of *Raya* and refused to apply "dominant socio-economic standards which might compel the institutionalization of the child."

In Re L[9] applied familiar due-process requirements to dependency proceedings. In this case, a child whose mother was found unfit was removed from the mother's custody by the juvenile court. Previously, the child's parents had divorced,

6. 255 Cal. App.2d 260, 266–267, 63 Cal. Rptr. 252, 256.

7. 255 Cal. App.2d 260, 267–268, 63 Cal. Rptr. 252, 257.

8. 274 Cal. App.2d 225, 78 Cal. Rptr. 880 (1969).

9. 267 Cal. App.2d 397, 73 Cal. Rptr. 76 (1968).

and the divorce decree had deprived the father of the child's custody. Once the juvenile court had assumed jurisdiction of the child, however, such jurisdiction was exclusive with regard to the minor's custody. The *L* Court, like the *Raya* Court, took note of the strong policy of the civil code to preserve both the right and responsibility of a parent with regard to custody of the child. The same policy is manifested in the juvenile code. Thus, Welfare and Institutions Code section 726 precludes deprivation of the parents' right to custody of their child, even though the child be a ward of the court, except in very limited circumstances. Protection of the parents' rights demands that custody be denied only as the result of proceedings that satisfy due process requirements. Accordingly, *In Re L* holds that such custody could not be withheld without an express finding by the court that the child's father was incapable of providing proper custody and control.

A final dependency case, *In Re Schmidt,*[10] states that the jurisdiction of a juvenile court is not geographically limited. The location of the proceedings is deemed a matter of venue rather than of jurisdiction. Attack on such an issue was held to be appropriate, then, only by appeal and not by collateral proceedings.

G. *Miscellaneous*

An unreported case, *Gonzalez v. Mailliard,*[11] attacked the constitutionality of Welfare and Institutions Code section 601 because of vagueness. As of this printing, no decision has been rendered.

In *In Re M.G.S.,*[12] the court, relying upon *Gault,* appears to conclude, in *dictum,* that the failure of counsel to present the defense of a minor's insanity deprives the minor of his constitutional right to effective aid of counsel.

Welfare and Institutions Code section 1800 proceedings. as described above, permit continued incarceration of a minor

10. 268 Cal. App.2d 137, 73 Cal. Rptr. 791 (1968).

11. Civil Action No. 50424, N.D. Calif., (December 9, 1968).

12. 267 Cal. App.2d 329, 72 Cal. Rptr. 808 (1968).

who reaches 21 years of age but whose release would constitute a physical danger to the public. The court in *In Re J.F.*[13] notes that such a commitment is based primarily on a prediction of what the minor is likely to do in the future. The very grave constitutional problems inherent in such a provision for preventive detention, however, are merely raised and neither discussed nor decided in this opinion.

H. *School Cases*

The constitutional consideration for minors illustrated by *Gault* and *Kent* has now been extended with equal vigor to the minor's relationship with his school in *Tinker v. Des Moines Independent Community School District.*[14] In an already famous *dictum,* the United States Supreme Court stated, "[I]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] The students in *Tinker* were suspended from school for wearing black armbands to publicize their objections to the Vietnam war. The Court found their activity to be "closely akin to 'pure speech,' " and thus entitled to protection under the First Amendment. The Court placed a heavy burden on school authorities to justify infringement of students' First Amendment rights. This burden requires the school officials to sustain a clear showing that a student's "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operations of the school.' "[16] By contrast, "undifferentiated fear or apprehension of disturbance is not enough."[17]

The Court thus recognized students to be citizens. "Students in school as well as out of school are 'persons' under our

13. 268 Cal. App.2d 761, 74 Cal. Rptr. 464 (1969).

14. 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969).

15. 393 U.S. 503, 506, 21 L.Ed.2d 731, 737, 89 S.Ct. 733, 736.

16. 393 U.S. 503, 509, 21 L.Ed.2d 731, 739, 89 S.Ct. 733, 738.

17. 393 U.S. 503, 508, 21 L.Ed.2d 731, 738–739, 89 S.Ct. 733, 737.

constitution. They are possessed of fundamental rights. . . . "[18]

The underlying rationale in *Tinker* is the Court's appreciation that education does not occur only within the classroom. "In our system, students may not be regarded as closed circuit recipients. . . ."[19] Education does not take place only when it is ". . . confined to the supervised and ordained discussion which takes place in the classroom. . . . Among those activities [which occur within a school] is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process."[20] *Tinker* thus provides a significantly new view of the student as a responsible individual actively participating in his own education.

Students are recognized to be "constitutional" persons in the case of *Meyers v. Arcata Union High School District*.[1] Meyers was ejected from school for violation of a school policy that stated that "extremes of hair style are not acceptable."

The court first found that hair styles are entitled to the protection of the First Amendment. School authorities may nevertheless regulate the exercise of this constitutional right, as well as others, so long as they do so in a constitutionally satisfactory manner. Ironically, the school authorities could have drawn upon their residual statutory authority, commented the court, to regulate hair style on a showing of its disruptive effect. Precisely this result was reached in the case of *Akin v. Riverside School District Board of Education*.[2] But the Arcata authorities relied instead on their written policy, which the court found to be unconstitutionally vague. First Amendment rights, stated the court, may be regulated "only

18. 393 U.S. 503, 511, 21 L.Ed.2d 731, 740, 89 S.Ct. 733, 739.

19. 393 U.S. 503, 511, 21 L.Ed.2d 731, 740, 89 S.Ct. 733, 739.

20. 393 U.S. 503, 512, 21 L.Ed.2d 731, 741, 89 S.Ct. 733, 739–740.

1. 269 Cal. App.2d 549, 75 Cal. Rptr. 68 (1969); for further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

2. 262 Cal. App.2d 161, 68 Cal. Rptr. 557 (1968).

with narrow specificity," and the phrase "extremes of hair styles" did not satisfy this exacting standard.[3]

Alvarez v. Santa Clara Unified School District,[4] follows *Tinker* in according California school students the right to wear politically significant berets and buttons in California schools.[4.5] On the other hand, *In Re Donaldson,*[5] a locker search case, disregards *Tinker's* introduction of the Constitution to the school campus. The opinion resorts to discredited rhetoric, reminiscent of apologies for the juvenile court, to describe a school principal as acting *in loco parentis.* The court improperly finds the principal not to be a state official within the meaning of the Fourteenth Amendment. Such a finding is unsupportable in light of *Tinker.* Having committed both these mistakes, the court is able to conclude incorrectly that marijuana obtained in an unlawful search and seizure by the school principal was properly admitted to sustain a subsequent juvenile court delinquency petition.

V. Conclusion

California juvenile law in no way resembles a "kangaroo court";[6] the legislature has seen to that. The rudimentary prerequisites enumerated by the United States Supreme Court in *Kent* and *Gault* are available to minors in California. But much remains to be done, both because the United States

3. The face of the land is presently obscured by hirsute judicial decisions. See, e.g., Breen v. Kahl, 419 F.2d 1034, (7th Cir. 1969); Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Richards v. Thurston, 304 F. Supp. 499, 38 U.S. Law Week, 2187 D. Mass. (Sept. 30, 1969) (a stylish decision by Massachusetts District Judge Wyzanski).

4. N.D. Cal. Civil No. 50926 (1969).

4.5. Two cases challenging the constitutionality of § 9012 and § 9013 of the California Education Code, which provide a blanket prohibition against the distribution of "propaganda" on school premises, are currently pending before a three-judge federal court, *O'Reilly v. San Francisco Unified School District,* N.D. Cal. Civil No. 51427 (leaflets), *Rowe v. Campbell Union High School District,* N.D. Cal. Civil No. 51060 (underground newspaper). A temporary restraining order was issued in the *Rowe* case enjoining the school authorities from interfering with distribution of the underground newspaper pending the hearing before the three-judge court.

5. 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (1969).

6. In re Gault, 387 U.S. 1, 28, 18 L. Ed.2d 527, 546–547, 87 S.Ct. 1428, 1444 (1967).

Supreme Court itself has only begun to domesticate juvenile law and because the California Supreme Court has been zealous to confine these beginnings. The holdings of *Kent, Gault,* and *Tinker* go no farther than they do because no more was required to dispose of the issues before the Court. A fair reading of these decisions, though, demonstrates the Court's dissatisfaction with the rule of rhetoric. The cases consolidate contemporary youth's expectation of equal justice without regard to age. Indeed, *Gault,* in particular, evidences the Court's solicitude for minors; their separate and unequal treatment can be justified only when the juvenile law affords them some demonstrable benefit.

In Re M and *Lara* fail to fulfill the expectation. They show little more than lip service to the reality of the minors' situations, of the state's patterns and problems of delinquency, or of the thrust of the juvenile process. Much of the now-discredited folklore and sentiment[7] still pervades those decisions and precludes any recognition of the implications of *Gault* and *Kent.*

Lara and *In Re M,* taken together, make plain the California Supreme Court's determination to defer to the legislature's 1961 and 1967 revisions of the juvenile code and, at the same time, to ignore the policy considerations that impelled those revisions, in the same way that the court has disregarded the philosophy inherent in *Gault* and *Kent.* Silence, from either source, presumably provides a rationale for immobility.

The revolution that Judge Bazelon predicted[8] has hardly begun. *Gault* and *Kent* presage the erosion of the old rhetoric. But the California courts must acknowledge those cases as seminal, not exceptional. "The highest motives and most enlightened impulses" no longer justify uncritical perpetuation of the "peculiar system for juveniles."[9] The California courts must still embark on that "candid appraisal"[10] of the system that the United States Supreme Court and the times demand.

7. 387 U.S. 1, 21, 18 L.Ed.2d 527, 541–542, 87 S.Ct. 1428, 1440.

8. Kent v. United States, 401 F.2d 408.

9. 387 U.S. 1, 17, 18 L.Ed.2d 527, 540, 87 S.Ct. 1428, 1438 (1967).

10. 387 U.S. 1, 21, 18 L.Ed.2d 527, 541–542, 87 S.Ct. 1428, 1440.

APPENDIX

Constitutional Rights		*U. S. Supreme Court Cases*	*California Statutes*	*California Cases*
I.	Adequate Notice	In Re Gault, 387 U.S. 1 (1967)	W & I Code §§ 630, 630.1, 658, 660	.....
II.	Right to Counsel	In Re Gault	W & I Code §§ 625, 627.5, 633, 634, 679, 700	In Re M. G. S., 72 Cal. Rptr. 808 (1968) People v. Cooper, 268 Cal. App.2d 34, 73 Cal. Rptr. 608 (1968)
III.	Self-Incrimination	In Re Gault	W & I Code §§ 625 (Miranda warning required) 627.5, 702.5	Scott v. Mayer, (N.D. Cal. Civil No. C–F0 441GSL, 1970)
IV.	Confrontation and Cross-Examination	In Re Gault	W & I Code §§ 630, 702.5	.....
V.	Right of Appeal (Adequate Review)	In Re Gault (not decided) Kent v. U. S., 383 U.S. 541 (1966)	.....	.....
VI.	Right to Transcript of Proceedings	.....	W & I Code § 800	.....
VII.	Rules of Evidence	.....		
	A. Admissibility of Hearsay	.....	.....	In Re Corey, 72 Cal. Rptr. 115 (1968) In Re F, 75 Cal. Rptr. 887 (1969) In Re R, 83 Cal. Rptr. 671 (1970)
	B. Standard of Proof	In Re Whittington, 391 U.S. 341 (1968) De Backer v. Brainard, 396 U.S. 28, 90 S.Ct. 179 (1969) In Re Winship, 396 U.S. —, 25 L Ed 2d 368, 90 S.Ct. 179 (1969)	W & I Code § 701	In Re M, 75 Cal. Rptr. 1 (1969) In Re K. D. K., 75 Cal. Rptr. 136 (1969)
	C. General	.....	.....	In Re M. G. S., 72 Cal. Rptr. 808 (1968) In Re Rambeau, 72 Cal. Rptr. 171 (1968)

Appendix

Constitutional Rights		*U. S. Supreme Court Cases*	*California Statutes*	*California Cases*
VIII.	Pre-judicial Stage Rights	.....	.....	.....
IX.	Postadjudicative Rights	.....	.....	.....
X.	Right to Bail	.....	.....	.....
XI.	Right to Arraignment	.....	.....	.....
XII.	Right to Indictment by Grand Jury	.....	.....	.....
XIII.	Right to Public Trial	.....	.....	.....
XIV.	Search and Seizure (4th Amendment)	.....	.....	In Re Donaldson, 75 Cal. Rptr. 220 (1968)
XV.	Right to Trial by Jury	De Backer v. Brainard, 396 U.S. 28, 90 S.Ct. 163 (1969) In Re Gault (not decided)	.....	In Re T. R. S., 81 Cal. Rptr. 574 (1969)
XVI.	Arrest Without Warrant in Misdemeanor Cases	.....	.....	.....
XVII.	Waiver of Miranda Rights	.....	.....	(Waiver ok) People v. Lara, 62 Cal. Rptr. 586 (1967) In Re M, 75 Cal. Rptr. 1 (1969) People v. Camarillo 72 Cal. Rptr. 296 (1968) (No waiver—"totality of circumstances") In Re Butterfield, 61 Cal. Rptr. 874 (1967) In Re Teters, 70 Cal. Rptr. 749 (1968) In Re H. L. R., 75 Cal. Rptr. 308 (1969) In Re Rambeau, 72 Cal. Rptr. 171 (1968)

Appendix

Constitutional Rights	*U. S. Supreme Court Cases*	*California Statutes*	*California Cases*
XVIII. First Amendment School Rights	Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)		Meyers v. Arcata Union High School Dist., 75 Cal. Rptr. 68 (1969) Akin v. Riverside School District Board of Education, 68 Cal. Rptr. 557 (1968) Alvarez v. Santa Clara Unified School Dist. (N. D. Cal. Civil No. 50926, 1969) Rowe v. Campbell Union High School District, N. D. Cal. Civil No. 51060 O'Reilly v. San Francisco Unified School District, N. D. Cal. Civil No. 51427
XIX. Fifth Amendment (Vagueness)	.....	.....	Gonzalez v. Mailliard, Civil Action No. 50424, (N. D., Cal., Dec. 9, 1969)